No. 16-1220

In The Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *ET AL.*,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO., LTD., *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF CHINESE PROFESSORS OF ADMINISTRATIVE LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*[1]

Amicus curiae YING Songnian is University Professor at the China University of Political Science and Law (CUPL), Honorary President of the Administrative Law Studies Institute of China Law Society (ALSCLS) and Chairman of the East Asia Institute of Administrative Law. Professor YING was a deputy to the 9th and 10th National People's Congress (NPC) and a member of the NPC Committee for Internal and Judicial Affairs. He is a principal leader of the Committee of Legislative Studies on Administrative Law of the NPC Commission of Legislative Affairs, an expert advisory body on administrative law to the NPC Standing Committee. In that capacity, he was involved in the drafting of various People's Republic of China (PRC) statutes, including the Administrative Litigation Law, State Compensation Law, Law on Administrative Penalties, Law on Legislation and Administrative License Law of the People's Republic of China.

Amicus curiae MA Huaide is Professor and Vice President of CUPL, President of ALSCLS and Editor-in-Chief of Administrative Law Studies. Professor MA

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[1] All parties to the case have consented to the filing of this brief. Petitioners consented in writing, and Respondents provided blanket consent by a February 15, 2018 letter to the Clerk. In accord with Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no such counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel has made any monetary contribution toward the preparation or submission of this brief.

was China's first Ph.D. in the study of administrative litigation law (from CUPL). He has been a senior visiting scholar at Yale University and a visiting scholar at Boston University and the University of Sydney (Australia). He was involved in the formulation of the State Compensation Law, Law on Administrative Penalties, Law on Legislation and Administrative License Law, among other statutes. He concurrently acts as legal counsel to PRC government agencies including the National Development and Reform Commission and the Ministry of Housing and Urban-Rural Development.

Amicus curiae JIANG Ming'an is Professor of Law and Director of the Constitutional and Administrative Law Center at Peking University (PKU), Vice President of ALSCLS and Editor-in-Chief of Administrative Law Review. Professor JIANG has been a senior visiting scholar at UCLA and the University of Cambridge (UK) and a visiting scholar at the University of Washington. He has been involved since 1984 in the formulation of PRC administrative laws and regulations, among them the Administrative Litigation Law, Administrative Review Law, State Compensation Law, Law on Administrative Penalties, Law on Legislation, Administrative License Law and Administrative Enforcement Law. He is a special advisor to the Supreme People's Court and an expert advisor to government agencies such as the Ministry of Civil Affairs and Ministry of Culture.

Amicus curiae YU An is Professor of Law in the School of Public Policy and Management (SPPM) and Director of the Institute of Government at Tsinghua

University, Vice President of ALSCLS and Vice President of the WTO Law Research Society of China. Professor YU received his S.J.D. degree from Peking University and was a visiting scholar at Heidelberg University (Germany) and Aarhus University (Denmark). He is an expert advisor to the Supreme Procuratorate, the Ministry of Education and the Ministry of Justice.

Amicus curiae YANG Jianshun is Professor of Law and Director of the Comparative Administrative Law Institute at Renmin University, Associate Chief Editor of the Jurist and Vice President of ALSCLS. He received his S.J.D. degree from Hitotsubashi University (Japan).

Amicus curiae LI Honglei is Professor at the Institute of Law, Chinese Academy of Social Sciences (CASS), Director of the Department of Constitutional and Administrative Law, Standing Member and Deputy Secretary General of ALSCLS and Vice Chair of the Committee on Government Regulation. He received his S.J.D. degree from Peking University and was a visiting scholar at Columbia University, Emory University and the London School of Economics (UK). He was adjunct professor at the University of Yamaguchi (Japan) and had a one-year secondment at the NPC Commission of Legislative Affairs where he was deeply involved in the drafting of many legislative bills.

Amici have an academic interest in, and expertise on, the subject of whether the Ministry of Commerce of the People's Republic of China, or MOFCOM (formerly

the Ministry of Foreign Trade and Economic Cooperation, or MOFTEC; hereinafter referred to as "Ministry of Commerce")[2] is an authoritative interpreter of the rules it makes. Petitioners' Brief, as well as the Brief of *Amici Curiae* Donald Clarke and Nicholas Calcina Howson in Support of Petitioners, have challenged the Ministry of Commerce's representation to the Second Circuit that it "has unquestioned authority to interpret applicable Chinese law." Pet. Br. 20; *see* Clarke & Howson *Amicus* Br. 17. This brief supports Respondents and the Ministry of Commerce, by explaining that a foundational principle underlying the Chinese system of legal interpretation is the concept that "the rule-maker has the authority to interpret the rule," and thus the Ministry of Commerce has authority to interpret applicable Chinese law.

SUMMARY OF ARGUMENT

The Ministry of Commerce is the constituent ministry primarily responsible for regulating China's international trade, and is immediately under the level of the State Council (equivalent to a cabinet-level department in the United States). In response to the Ministry of Commerce's *amicus* briefs in this matter concerning its "2002 Notice,"[3] Petitioners (and the

[2] Petitioners' Brief refers to the Ministry of Commerce as "the Ministry." Pet. Br. 5 & n.3.

[3] GUAN YU TIAO ZHENG CHU KOU SHANG PIN HAI GUAN SHEN JIA MU LU DE TONG ZHI [Notice Regarding Adjustment of the Customs Price Verification Catalogue of Export Commodities] (Wai Jing

supporting *amicus* brief by Clarke and Howson) have challenged the Ministry of Commerce's representation that it "has unquestioned authority to interpret applicable Chinese law." Pet. Br. 20; *see* Clarke & Howson *Amicus* Br. 17. The Ministry of Commerce's interpretative authority under Chinese law, however, is clear and well-established. In accordance with China's system of legal interpretation, the Ministry of Commerce has the power to interpret its own rules. The Ministry of Commerce makes legally binding and authoritative interpretations of the rules it establishes both through administrative rulemaking and through documents setting forth administrative standards.

A foundational principle underlying the Chinese system of legal interpretation is the concept that "the rule-maker has the authority to interpret the rule." The Law on Legislation; the Regulations on Procedures for the Formulation of Administrative Regulations; and the Regulations on Procedures for the Formulation of Rules each provide that the entity establishing statutes or rules necessarily has authority to interpret these statutes and rules. The reason why China's system of legal interpretation has established the principle of "the rule-maker has the authority to interpret the rule," is because China ascribes to the belief that the goal of legal interpretation is to seek out the rule's original intended meaning. The entity that

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Mao Mao Fa [2002] No. 187), Mar. 29, 2002, http://wms.mofcom.gov.cn/article/zcfb/200208/20020800037837.shtml (P.R.C.).

established the rule is the entity that is best suited to explain the original meaning.

Based on this principle of "the rule-maker has the authority to interpret the rule," the Ministry of Commerce has the authority to interpret its 2002 Notice because it was the Ministry of Commerce that prepared and issued the administrative rule. In the PRC, it is uncontroverted that the Ministry of Commerce has the authority to interpret its own rules. And the Ministry of Commerce is continuously doing so, issuing interpretations through a variety of means, including opinions, notices, provisional rules, response letters, formal replies, and other documents.

The principle that "the rule-maker has the authority to interpret the rule" does not exclude other governmental bodies from interpreting rules. The authority to interpret rules is not restricted to a single governmental entity. However, the rule-maker's own interpretation is authoritative. For example, other governmental bodies may interpret laws passed by the National People's Congress (NPC) and its Standing Committee, but the NPC Standing Committee's own interpretation is the most authoritative, and other interpretations must be consistent with the NPC Standing Committee's interpretations. When a ministry (such as the Ministry of Commerce) interprets the very rules that it has created, its interpretation is authoritative. All other ministries must follow that ministry's authoritative interpretation, which plays an important role in guiding subordinate administrative

bodies in implementing their administrative enforcement activities.

The authoritativeness of the Ministry of Commerce's interpretation of the rules it has created is not reduced by the existence of mechanisms for analyzing and supervising the implementation of those interpretations. The interpretations are authoritative because the government body's act of interpretation – here, by the Ministry of Commerce – has regulatory impact and the force of law.

Moreover, in China, the rule-maker's interpretation of its own rules is controlling upon the courts. When a State Council ministry – such as the Ministry of Commerce – interprets its own regulations, the Chinese courts give those interpretations deference because the ministry best understands the original intent and purpose of its own regulations. Deference is also given for the public policy reason that a ministry under the State Council, which is responsible for regulating matters within its field, is in a better position to address specialized issues and policy issues in that area.

Here in particular, where foreign trade is a sector requiring strong specialized knowledge and policy expertise, Chinese courts would be compelled – outside of extreme cases where the interpretation clearly violates the law or a ministry has abused its power – to defer to the guidance of the responsible ministry, the Ministry of Commerce. The deference accorded to the Ministry of Commerce's own rules in China vitiates

Petitioners' questioning of the Ministry of Commerce's "law-*interpreting* power." *See* Pet. Br. 43 (emphasis in original).

ARGUMENT

The Ministry of Commerce[4] issued the "2002 Notice" at issue in this suit and filed the *amicus* brief before the United States District Court for the Eastern District of New York and the United States Court of Appeals for the Second Circuit concerning Chinese law. It correctly asserted in its *amicus* brief to the Second Circuit that it "has unquestioned authority to interpret applicable Chinese law." Br. for *Amicus Curiae* Ministry of Commerce of the People's Republic of China at 14, Dkt. 105, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014). The Ministry of Commerce's assertion reflects a well-established principle under Chinese law. In accordance with China's system of legal interpretation, the Ministry of Commerce has the power to interpret its own rules. The Ministry of Commerce makes legally binding and authoritative interpretations of the rules it establishes both through administrative rulemaking and through documents setting forth administrative standards.

[4] The Ministry of Commerce, in its position immediately under the State Council, is equivalent to a United States cabinet-level department, and is primarily responsible for regulating China's international trade.

I. It is a Foundational Principle of Chinese Law that "The Rule-Maker has the Authority to Interpret the Rule"

The Chinese system of legal interpretation holds that government entities necessarily have authority to interpret the rules they make, *i.e.*, "the rule-maker has the authority to interpret the rule." *See, e.g.*, ZHANG Zhi Ming, *Fa lü jie shi xue* [The Study of Legal Interpretation] 152 (Beijing: Zhongguo Renmin Daxue Chubanshe [China Renmin University Press], 2015) (hereinafter "The Study of Legal Interpretation").[5] That doctrine is not only a foundational principle of Chinese legal theory, it is also set forth in law. Article 33 of the Regulations on Procedures for the Formulation of Rules states "the power to interpret rules shall reside with the rule-maker." GUI ZHANG ZHI DING CHENG XU TIAO LI [Regulations on Procedures for the Formulation of Rules] art. 33 (promulgated by Decree No. 322 of the State Council of the People's Republic of China,

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[5] As that treatise explains, "Statutes, administrative regulations, and local regulations are all of the same nature. What must be noted here is that the concept *'the rule-maker must have the authority to interpret laws'* does not need to itself be law in order to be firmly accepted by the people without any doubts at all. This is because the common accepted belief among the people is that legal interpretation must match the original intent of the legislature and must match the intended purpose behind the creation of the law. And when it comes to the original intent or the purpose behind the creation of the law, there is nobody who knows it better than the legislative body itself." ZHANG Zhi Ming, The Study of Legal Interpretation, at 152 (emphasis added).

Nov. 16, 2001), http://www.gov.cn/gongbao/content/2002/content_61556.htm (P.R.C.).

A number of other Chinese laws set forth the right of individual rule-making bodies, such as the NPC, to interpret the rules it makes. Thus, for example, Article 45 of the Law on Legislation provides that the NPC Standing Committee is the proper authority for interpreting the statutes[6] passed by the NPC: "The power to interpret a national law shall vest in the Standing Committee of the National People's Congress." LI FA FA [Law on Legislation] art. 45 (as amended, promulgated by the Nat'l People's Cong., Mar. 15, 2015, effective Mar. 15, 2015), http://www.npc.gov.cn/npc/dbdhhy/12_3/2015-03/18/content_1930713.htm (P.R.C.).[7] A similar rule, embodying the same fundamental principle, expressly applies to regulations. Article 31 of the Regulations on Procedures for the Formulation of Administrative Regulations provides, "The State Council shall interpret those articles of administrative regulations that need further definitions or supplementary provisions." XING ZHENG FA GUI ZHI DING CHENG XU TIAO LI [Regulations on

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[6] The reference to statutes here means the legal norms set by the NPC and its Standing Committee. The statutes made by the NPC are interpreted by its Standing Committee as the entire NPC only meets once a year whereas the NPC Standing Committee is a permanent organ of the NPC. *See* XIAN FA [The Constitution] art. 57, Mar. 11, 2018 (P.R.C.). An English translation of the 2007 version of the Constitution is available at: http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372965.htm. The Constitution was amended in March 2018, but the language of art. 57 remains unchanged.

[7] An English translation is available at: https://www.chinalawtranslate.com/2015lawlaw/?lang=en.

Procedures for the Formulation of Administrative Regulations] art. 31 (promulgated by Decree No. 321 of the State Council of the People's Republic of China, Nov. 16, 2001), http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=38101 (P.R.C.).[8]

The reason why China's system of legal interpretation has established the principle of "the rule-maker has the authority to interpret the rule" is because China ascribes to the belief that the goal of legal interpretation is to seek out the rule's original intended meaning. The entity that established the rule is the entity that is best suited to explain the original meaning. This is why China's legal community has a common understanding that the entity that creates the rule necessarily has the authority to interpret it. As

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[8] Effective May 1, 2018, this regulation has been amended to provide, "The State Council shall interpret administrative regulations in any of the following circumstances: (1) where the specific meaning of provisions of administrative regulations needs to be further clarified; or (2) where the emergence of new circumstances after formulation of administrative regulations requires clarification of their applicable basis." XING ZHENG FA GUI ZHI DING CHENG XU TIAO LI [Regulations on Procedures for the Formulation of Administrative Regulations] art. 31 (promulgated by Decree No. 321 of the State Council of the People's Republic of China on Nov. 16, 2001, and revised pursuant to art. 17 of Decree No. 694 of the State Council of the People's Republic of China, the Decision of the State Council on Revising the Regulations on Procedures for the Formulation of Administrative Regulations, dated Dec. 22, 2017, and effective as of May 1, 2018), http://www.gov.cn/zhengce/content/2018-01/16/content_5257039.htm (P.R.C.). An English translation of the current version is available at: http://www.gov.cn/english/laws/2005-08/24/content_25827.htm. An English translation of the amended version is available at: https://law.yale.edu/system/files/documents/pdf/china/2018_sc_en_rev_admin_regulation_procedure.pdf.

explained by Professor DONG Hao (the Vice President of the Administrative Law Studies Institute of China Law Society[9]), "Legislation is the act of turning the legislator's intent into law. Therefore, the purpose of legal interpretation is to seek out and implement the legislator's intent. This is why the legislative body itself is the most appropriate entity for interpreting these laws." DONG Hao, *Si fa jie shi lun* [Judicial Interpretation Theories], 278 (Beijing: Zhongguo Zhengfa Daxue Chubanshe [China University of Political Science and Law Press], 1999).

This concept, that legal interpretation consists of seeking out and implementing the intent of the legislature, is repeatedly expressed in Chinese laws and regulations. In cases of national significance, the NPC Standing Committee has reiterated that it is legislative intent that must be followed when interpreting and applying the law. In the case of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Basic Law"), the NPC Standing Committee has passed laws specifically requiring that legislative intent be implemented. Thus, in the Interpretation by the NPC Standing Committee of Article 22.4 and Article 24.2(3) of the Basic Law, the Standing Committee explained that its object was to give effect to the legislative intent behind Hong Kong's Basic Law: "The original legislative intent elucidated

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[9] Professor DONG Hao, in addition to being Vice President of ALSCLS, was previously Vice President of Zhuhai Intermediate People's Court in Guangdong. He is one of the most respected Chinese scholars on the issue of legal interpretation.

by this Interpretation and the original legislative intent of the other categories of Paragraph 2 in Article 24 of the Basic Law of the Hong Kong Special Administrative Region have been embodied in the Opinions on the Implementation of the Second Paragraph of Article 24 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which were adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress on August 10, 1996."[10] In other words, in interpreting the meaning of the Basic Law, the NPC Standing Committee not only looked to the legislative intent of the Basic Law, but it has even issued its own directives setting forth this legislative intent and instructing others on the need to apply this legislative intent.

As these authorities make clear, the principle that "the rule-maker has the authority to interpret the rule" is firmly established under Chinese law.

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[10] QUAN GUO REN MIN DAI BIAO DA HUI CHANG WU WEI YUAN HUI GUAN YU "ZHONG HUA REN MIN GONG HE GUO XIANG GANG TE BIE XING ZHENG QU JI BEN FA" DI 22 TIAO DI 4 KUAN HE DI 24 TIAO DI 2 KUAN DI (3) XIANG DE JIE SHI [Interpretation by the Standing Committee of the National People's Congress of Article 22.4 and Article 24.2(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Basic Law")] (adopted by the Standing Comm. of the Nat'l People's Cong., June 26, 1999), http://www.npc.gov.cn/wxzl/gongbao/2001-02/06/content_5004737.htm (P.R.C.). An English translation is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383897.htm.

II. The Ministry of Commerce's Interpretation of Its Rules is Authoritative

In accordance with the principle of Chinese legal interpretation that "the rule-maker has the authority to interpret the rule," the Ministry of Commerce has the authority to interpret the 2002 Notice it issued.

The Ministry of Commerce's *interpretive* authority is amply supported by Chinese law. For example, the Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law (1981) not only provides that the NPC Standing Committee shall exercise the power to interpret law, it also specifically states that the power of interpretation also resides in the Supreme People's Court, Supreme People's Procuratorate, the State Council and the ministries of the State Council.[11] The

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[11] The Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law of 1981 expressly provides that the State Council and its ministries shall have power to interpret the laws and decrees (*e.g.*, to interpret the legal rules established by the NPC and its Standing Committee). QUAN GUO REN MIN DAI BIAO DA HUI CHANG WU WEI YUAN HUI GUAN YU JIA QIANG FA LÜ JIE SHI GONG ZUO DE JUE YI [Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law] (adopted by the Standing Comm. of the Nat'l People's Cong., June 10, 1981), http://www.npc.gov.cn/wxzl/gongbao/2000-12/06/content_5004401.htm (P.R.C.). An English translation is available at: http://www.asianlii.org/cn/legis/cen/laws/rotscotnpcpaiiotl1125/. The conclusion by Professor Donald Clarke and Professor Nicholas Howson in their Brief of *Amici Curiae* that the Ministry of Commerce has no authority to interpret statutes is wrong. *See* Clarke & Howson *Amicus* Br. 19.

Ministry of Commerce is one of the ministries of the State Council and thus it has specific authorization to interpret law from the NPC.

The State Council has also issued formal regulations stating that ministries – such as the Ministry of Commerce – have the authority to interpret administrative regulations. In particular, the Notice of the State Council General Office Concerning the Authority of Interpretation of Administrative Regulations and Procedural Matters states that both the State Council and the ministries under the State Council have the authority to interpret administrative regulations. GUO WU YUAN BAN GONG TING GUAN YU XING ZHENG FA GUI JIE SHI QUAN XIAN HE CHENG XU WEN TI DE TONG ZHI [Notice of the State Council General Office Concerning the Authority of Interpretation of Administrative Regulations and Procedural Matters] (Guo Ban Fa [1999] No. 43) (promulgated by the State Council General Office, May 10, 1999), http://www.law-lib.com/law/law_view.asp?id=107706 (P.R.C.). In fact, the reality is that ministries (such as the Ministry of Commerce) are the ones that actually handle the overwhelming majority of regulatory interpretation due to their subject-matter expertise and the massive number of regulations at issue. The Ministry of Commerce, for its part, has been constantly and continuously interpreting its own rules through opinions, notices, provisional rules, response letters, formal replies, and through other documents.

The principle that "the rule-maker has the authority to interpret the rule" does not necessarily mean that other authorities are excluded from interpreting

rules. In other words, the authority to interpret rules is not restricted to a single entity. But the Ministry of Commerce is unquestionably one of the entities with authority to interpret the law. The ministries under the State Council (such as the Ministry of Commerce) have authority to interpret both laws and regulations, and in fact do so on a regular basis. Those interpretations are treated as authoritative, and are deferred to by courts, procuratorates and administrative bodies. *See infra* Part III.

III. The Ministry of Commerce's Interpretation Remains Authoritative and is Deferred to by Chinese Courts

The *amici* Clarke and Howson argue that China's system of checks and balances somehow contradicts or diminishes the authority of the Ministry of Commerce to interpret its rules.[12] Clarke & Howson *Amicus* Br. 19.

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[12] Clarke and Howson also argue against the deference afforded by the Second Circuit, contending that "[t]he Chinese Government is not a neutral observer," and "may have a party-like interest in the case." Clarke & Howson *Amicus* Br. 8 (capitalization omitted). Yet even though China's state-owned enterprises are frequent parties to U.S. litigation, the Ministry of Commerce has never appeared in U.S. litigation until the present case. The complete absence of any Ministry of Commerce participation in past U.S. litigations refutes the claim that the Ministry of Commerce is doing so here because "a mercantilist government such as China's . . . is going to view siding with its nationals as a policy imperative," *id.* at 10.

To the contrary, the allegation of "partiality . . . in this case," *id.* at 10, is more applicable to those who are repeatedly hired as expert witnesses in cases involving foreign law, *see id.* 1-2. The

They argue that the Ministry of Commerce's regulatory interpretations could be deemed invalid if the interpretation somehow violated other laws.[13] *Id.* Yet

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Second Circuit's rule is preferable to U.S. trial courts attempting to weigh foreign governments' statements about their own law against the testimony of partisan expert witnesses. This is especially true considering that "relatively few judges are experienced in the area [of foreign law] and the procedures of foreign legal systems are often poorly understood." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 552 (1987) (Blackmun, J., concurring in part and dissenting in part).

[13] Clarke and Howson also assert that the Chinese government has a "party-like interest in the case" because Hebei Welcome Pharmaceutical Co. Ltd. is a subsidiary of a state-owned enterprise, and is therefore "deemed under the Chinese system to be a state-owned enterprise." Clarke & Howson *Amicus* Br. 8-9. However, in three previous appearances as an expert witness for plaintiffs suing Chinese litigants, Clarke has taken contradictory positions as to whether or not a subsidiary of a state-owned enterprise is itself a state-owned enterprise. *See Stansell v. BGP, Inc.*, 8:09-cv-2501, Dkt. 56 (M.D. Fla. Apr. 29, 2010) (subsidiary of state-owned enterprise "is not considered 'state-owned' under Chinese corporate law" and is "*not* [to be] deemed 'state-owned' " (emphasis in original)); *Ocean Line Holdings Ltd. v. China Nat'l Chartering Corp.*, 1:07-cv-08123, Dkt. 28 (S.D.N.Y. Jan. 30, 2008) (again concluding that the subsidiary of state-owned enterprise is not "owned by the Chinese state" but rather is owned by the parent company); *Trans Chemical Ltd. v. China Nat'l Machinery Import and Export Corp.*, 978 F. Supp. 266 (S.D. Tex. 1997) (concluding that a subsidiary of a state-owned enterprise *is* itself a state-owned enterprise). Clarke's contradictory positions demonstrate just how distant the connection is between (1) a ministry of (2) China's State Council and (3) a subsidiary of (4) a parent company that is owned by (5) an entity that is controlled by (6) the government. The Chinese government does not have a "party-like interest" in every case to which it can be linked through six degrees of separation.

they do not provide a single example of any Ministry of Commerce interpretation of its regulations being invalidated, and they certainly do not suggest that the Ministry of Commerce regulations at issue here are invalid or even challenged in China. More importantly, the theoretical possibility of a Ministry of Commerce interpretation being held invalid does not alter the fact that the Ministry of Commerce has the clear authority to interpret its own regulations, consistent with the principle that "the rule-maker has the authority to interpret the rule," and contrary to Petitioners' arguments, *see* Pet. Br. 42-43.

While courts, procuratorates and other administrative bodies will inevitably interpret laws while discharging their administrative or judicial functions, the interpretations by the issuing ministry are treated as authoritative, and are deferred to by the courts and other governmental bodies. Indeed, Chinese courts implement the interpretations given by China's ministries, such as the Ministry of Commerce.

Thus, in the case of Huazhong Bearing Factory against the Labor Bureau of Binhu District, Wuxi Municipality (*see* App. A),[14] the appellate court cited to and

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[14] HUA ZHONG ZHOU CHENG CHANG BU FU WU XI SHI BIN HU QU LAO DONG JU SHE HUI BAO ZHANG XING ZHENG QUE REN AN [Huazhong Bearing Factory v. Labor Bureau of Binhu District, Wuxi Municipality] (Intermediate People's Court of Wuxi Municipality, Jiangsu Province (2005) Xi Xing Zhong Zi No. 50, Oct. 31, 2005). This case was included in China's Key Trial Cases Abstract – Administrative Trial Case Volume, which was compiled in 2007 in a joint project by the National Judges College and Renmin University Law School (China Renmin University Press and People's

applied the interpretation given by the government ministries without conducting its own analysis:

> According to the Ministry of Labor and Social Security's regulation entitled "Response Letter Regarding the Interpretation of the Phrase 'Willful Violation of Rules' Within the 'Trial Measures on Work-Related Injury Insurance for Enterprise Employees,'" the term "willful violation of rules" refers specifically to malicious acts undertaken with a conscious motive and purpose. The phrase should not apply to ordinary violations of rules. JIANG Yonglin did not intend for the injury to occur. . . . Therefore, it meets the criteria for work-related injuries.

App. A at 16-17. In reaching its decision as to the proper interpretation of a disputed phrase, the court followed the interpretation given by a ministry immediately under the State Council. *See id.*

Chinese courts are obligated to defer to ministry interpretations for the public policy reason that a ministry under the State Council is responsible for regulating matters within its field, and is therefore in a better position to address specialized issues and policy issues in that domain. Foreign trade is a sector that

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Court Press, 2008. P323). At the time this case was collected as a "Key Trial Case," China had not yet created a generally accessible database of cases, and so this case was one of a select few chosen as exemplars. China's Key Trial Cases Abstract was created and published in part by the National Judges College, which is affiliated with China's Supreme People's Court. A certified English translation is included at App. A.

requires strong specialized knowledge and policy expertise, and so courts will be compelled to defer to the guidance of the responsible ministry. In the case of Tianjin Yuyou Enterprise Co., Ltd. against Tianjin Economic and Technological Development Area Administrative Committee (*see* App. B),[15] a contentious question was whether the Provisional Regulations on the Administration of Voluntary Quotas for Export Products promulgated by MOFTEC [the former name for MOFCOM, *i.e.*, the Ministry of Commerce] in April 1995 was binding upon export license applications that had been made prior to the implementation of the new regulations. *See id.* Neither the Tianjin Higher People's Court nor the Supreme People's Court conducted any substantive review of MOFTEC's interpretation. *See id.* Rather they deferred to MOFTEC's interpretation and applied that interpretation to the case. *See id.* Thus, contrary to Petitioners' and Clarke and Howson's *amicus* arguments, the Ministry of Commerce's interpretations have already been treated as binding by China's Supreme People's Court.

CONCLUSION

For the foregoing reasons, Petitioners' questioning of the Ministry of Commerce's "law-*interpreting* power" is without merit. *See* Pet. Br. 42-43; *see also* Clarke &

[15] TIAN JIN YU YOU QI YE YOU XIAN GONG SI YU TIAN JIN JING JI JI SHU KAI FA QU GUAN LI WEI YUAN HUI XING ZHENG JIU FEN ER SHEN AN [Tianjin Yuyou Enterprise Co., Ltd. v. Tianjin Economic and Technological Development Area Administrative Committee] (Supreme People's Court (1997) Xing Zhong Zi No. 21, July 3, 1998).

Howson *Amicus* Br. 17. Under China's system of legal interpretation, the rule-maker has the power to interpret the rules it makes. This is known as the doctrine of "the rule-maker has the authority to interpret the rule." This doctrine is rooted in Chinese legal theory, expressed in Chinese laws and regulations, recognized by Chinese courts, and specifically extends to the Ministry of Commerce's interpretative authority over the 2002 Notice it created and that is at issue in this suit.

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